United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,424

LEROY J. ELLIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN McDANIEL
Attorney for Appellant

QUESTIONS PRESENTED

1. Whether the Government must prove by sufficient connecting evidence that the dead body discovered on July 6, 1963 was in fact the same body as that of the person who was struck about the head by the appellant on June 30, 1963?

2. Whether the trial court should have granted appellant's motion for judgment of acquittal at the conclusion of Government's case-in-chief?

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in the Court below. Appellant was convicted of a one count indictment that charged him with Second Degree Murder, a violation of Title 22, Section 2403 of the District of Columbia Code of Laws, 1961 Edition. Appellant was sentenced to a term of two to six years imprisonment. Appellant was granted leave to proceed on appeal without prepayment of cost and his appeal was duly noted. This being a final order of the United States District Court for the District of Columbia, jurisdiction is vested in this Court.

STATEMENT OF CASE

On August 12, 1963, the appellant was indicted in a one count indictment charging him with the crime of Second Degree Murder in violation of Title 22, Sec. 2403 of the District of Columbia Code of Laws, 1961 Edition. This indictment charged that appellant had, "on or about June 30, 1963, within the District of Columbia, with malice aforethought, murdered James Wilson, Jr., by means of striking him with a piece of wood causing injuries from which the said James Wilson, Jr., did die on or about July 6, 1963." Following a two-day jury trial, appellant was convicted of a lesser and included offense of manslaughter. The appellant was sentenced to a term of two to six years. (Original Record).

A witness named Benjamin F. Taylor testified for the Government that he had witnessed a two part episode of an altercation occurring on the evening hours of June 30, 1963 wherein he saw an acquaintance get cut, the defendant intervening on behalf of his acquaintance, and ultimately the defendant striking a person over the head with a board (4x4) in front of 468 K Street, Northwest. (Tr. 4-12 Inclusive) The witness Taylor said he saw the man who had been struck go down to the ground; that he left area immediately without seeing man get up, took McFarland to hospital and not returning near the scene until approximately eleven o'clock P.M. that night of the same evening. (Tr. 12-13,

Inclusive). The witness Taylor further indicated that not only was it that he was without any knowledge of the existence of this man he saw struck but that he did not see him any more as well as he had not seen him prior to the incident. (Tr. 14)

However, on one occasion earlier in the witness Taylor's testimony, he (Taylor) used the name "Wilson" as being one that he "learned" was applied to the man involved with his friend (McFarland). (There was no indication as to where or from whom the name was learned) (Tr. 4.) The prosecutor very skillfully injected into the trial the name Wilson as being synonymous with the dead man. The witness Taylor answered all questions. (Tr.8-13). This skill carried over to appellant's counsel who casually referred to "Wilson" as the "dead man" in one of his questions to Taylor. (Tr. 14).

Dr. Linwood L. Rayford, Deputy Coroner for the District of Columbia was called as a second witness for the Government. The Deputy Coroner testified to the performance of an autopsy on the remains of a person identified to him as "John Doe" and not as John Wilson, Jr. The Deputy Coroner said he learned the name to be James Wilson. (Tr. 29). He determined the cause of death to be "increased intra-cranial pressure due to an epidural, which is a collection of blood above the thickest covering of the brain between the thickest covering of the brain and the skull and there was also a subdural which means a collection below this

thick covering and between the brain and this thick covering." (Tr. 29-30). The Deputy Coroner hyposthesized that if the corpse had been struck over the head with a board (4x4), this striking "could have been a contributing cause" to the condition that he found at time of autopsy and for that which he had said death had been caused. The Deputy Coroner further hyposthesized , though reluctuntly, that death could have probably been caused by a fall to the sidewalk of concrete pavement, that is, the injuries found at autopsy could have probably resulted from fall and ultimate death of victim. The Deputy Coroner also testified to a condition of .25 percentage of alcohol in blood of the corpse, a state of intoxication at the time of its demise. (Tr. 30-34 Inclusive).

Arthur F. Digennaro, a Metropolitan Police Officer, was also called for the Government to testify. In his testimony Officer Digennaro stated that he discovered this unconscious body on the sidewalk at Mount Vernon Place, Northwest on July 6, 1963; that he took the man by #2 Precinct and subsequently to District of Columbia General Hospital; that he did not know the man's name and he was told that the man had died. (Tr. 35-37).

At that point the Government rested its case, a motion for judgment of acquittal was made on behalf of appellant which was promptly denied by trial Court. (Tr. 38 and Tr. 2 of Supplemental transcript).

STATUTE AND RULE INVOLVED

Title 22, D. C. Code, Sec. 2403, provides in pertinent part:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Title 18, U.S.C. Rule 29 (a) Provides:

> Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT OF POINTS

1. In a Second Degree Murder trial the Government must prove to a moral certainty the death of the person for which the appellant was indicted and tried.

With respect to Point 1, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 2, Tr. 9-13, inclusive. Original Record: Indictment.

2. In a Second Degree Murder trial the Government must also prove the existence of a dead body and it must further identify this body as being the same as that of the person charged to have been killed before proof of the corpus delicti is complete.

With respect to Point 2, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 29-38, inclusive.

3. Where the corpus delicti has not been established in a Second Degree Murder trial, the trial court had no discretion except to grant appellant's motion for judgment of acquittal.

With respect to Point 3, appellant desires the Court to read the following pages of the reporter's transcript: (Same as Points 1 and 2) Tr. 2, Tr. 9-13 inclusive; Tr. 29-38, inclusive. Original Record: Indictment.

SUMMARY OF ARGUMENT

POINT I

A necessary and material element of the crime of Second Degree Murder is that the Government must prove the in fact death of the person for which the appellant has been indicted and tried. Where the Government had charged by way of indictment that the appellant Leroy J. Ellis had struck one James Wilson, Jr., about the head, causing injuries from which the said James Wilson, Jr, died, under this indictment it was incumbent upon the Government to prove to a moral certainty that this person so struck did in fact die from alleged striking before any form of homicide could have become pertinent. The appellant contends that the mere production of a dead body some seven days later without more other than a possible tenuous similarity of names, doesnot prove death of the person struck over the head on June 30, 1963 by appellant.

POINT II

The Government failed to prove that the dead body that was discovered on July 6, 1963 was in fact the same body as that of the person who was struck about the head by appellant on June 30, 1963. No witness identified these bodies as one and the same; nor did any witness give specific evidence of identifying traits such as weight, height, size, color, physical shape, and the like as to either body such that a trier of fact could infer identity of bodies. Again, a possibility of similarity of names

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could not suffice for the important element of evidence of identity in this case.

POINT III

Since the Government had failed to prove a corpus delicti where it had not proved that person struck about head was dead or that a discovered dead body was in fact the same as that of the person struck about the head, the trial court had no alternative except to grant appellant's motion for judgment of acquittal.

ARGUMENT

POINT I

IN A SECOND DEGREE MURDER TRIAL THE GOVERNMENT MUST PROVE TO A MORAL CERTAINTY THE DEATH OF THE PERSON FOR WHICH THE APPELLANT WAS INDICTED AND TRIED

(With Respect To Point 1, Appellant Desires The Court To Read The Following Pages Of The Reporter's Transcript: Tr. 2, Tr. 9-13, inclusive. Original Record: Indictment.)

A material ingredient for the crime of Second Degree Murder under D. C. Code, Sec. 22-2403, (which was murder at common law requiring the felonious killing of a human being by another with malice aforethought, 1 Wharton's Criminal Law and Procedure, (1957 Ed.), Sec. 241, P. 522, is death of the person for which the accused has been indicted and tried. In this case the appellant had been charged by way of indictment as follows:

> "On or about June 30, 1963, within the District of Columbia, Leroy J. Ellis, with malice aforethought murdered James Wilson, Jr., by means of striking him with a piece of wood causing injuries from which the said James Wilson, Jr., did die on or about July 6, 1963."

Under this indictment the Government is compelled to prove the death of the person for which Leroy J. Ellis, our appellant, was being tried. The indictment specifically charged our appellant with having struck a man named James Wilson, Jr., with a piece of wood. Thus, logically, the victim whose death is the subject of inquiry would be the person allegedly struck by our

appellant. Consistently then, the Government has the burden of proving to a moral certainty that this person so struck did in fact die before any form of homicide can become pertinent.

In 78 Am. Dec. 255-257, the following note is helpful to us in measuring and outlining the necessity for and caliber of proof relevant to establishment of death in the first instance:

> "In murder, manslaughter, and all cases of intentional voluntary homicide, that corpus delicti has two component elements, viz., death as the result, and the criminal agency of another as the cause....The fact of the death is the fundamental and material fact to be established in these cases; and it should be shown either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death, and which accounts for the disappearance of the body. Expressed in another form, the body must be found, or there must be equivalent proof of death. The proof must show that a body of the person for whose murder the prisoner has beenindicted and tried...."

Our first duty is to explore the evidence at trial to ascertain whether the Government produced the quantum of proof to establish the fact that the person allegedly struck by our appellant on June 30, 1963 did in fact die and second, if he died did the Government produce proof of this death, as for example, a dead body or an "equivalent proof of death"?

At the trial, the Government called a witness by the name of Benjamin F. Taylor, who testified to a striking of an unidentified man over the head by our appellant with a board in the dimension of a 4x4. According to the witness Taylor, this

striking happened in the evening hours of June 30, 1963 in front yard of 468 K Street, Northwest, Washington, D. C. Other than seeing the man struck go down to the ground the witness Taylor gave no further evidence regarding the effects of the blow or what happened to this said person thereafter, such as possible medical treatment at a hospital or by a private physician. Moreover, except for apparent hearsay information and rumors to the effect that he heard the man struck was named "Wilson" and that he heard this man was dead, Mr. Taylor advanced no new fact regarding the consequence of the striking; nothing was elicted from Mr. Taylor as to any matters subsequent to June 30, 1963.

While the trial court and jury had before them a stipulation to the effect that the "deceased person that was hit in the head that night was a man named James Wilson, Jr." as well as substantial portions of Mr. Taylor's direct examination and cross-examination wherein questions were propounded and answers given indicative of the fact that the man struck about the head was named "Wilson" and he was in fact dead, no identifying information about this so called dead man came from the mouth of the witness Taylor, such as physical features and traits, peculiarity, type of clothing wearing, possible age, and the like. Thus, if this person died, as the indictment charged, the Government at this point had not really given any standard of comparison by which to determine if in fact the dead body that may be produced will in fact be the one that is the subject of

our inquiry. Identity of the victim has not been established as yet by Mr. Taylor's testimony. The total of what he has testified to, by no means, supplies this missing link in and of itself.

At this juncture an observation should be made regarding the order of proof as it bears on the fact that the first notion of death, except as by way of indictment with which the jury was familar, came in the form of a leading question from the Assistant U.S. Attorney to the witness Taylor as indicated on Page 8 of Transcript.

"Q. All right. Where did you see Ellis chasing Wilson, the dead man, after you first saw them? What route was followed".

Devastatingly, at that point in the trial, the prosecution had planted in the mind of the jury the first or initial evidentiary notion, idea, or suggestion of death having come to the man allegedly struck by our appellant.

The subtle manner of using "dead man" as synonymous with "Wilson" could not at that point have been considered as improper for the indictment charged that James Wilson, Jr., was killed at hand of our appellant. As to this procedure, 6 Wigmore Evidence (1940 3rd Ed.), Sec. 1871, P. 504, provides as follows:

> "Thus the fundamental rule, universally accepted, is that, with reference to facts whose relevancy depends upon others, the order of presentation is left to the discretion of the party himself, subject of course to the general discretion of the trial court... in controlling the order of

> evidence. In other words, if an evidential fact offered has an apparent connection with the case on the assumption that other facts shall also be proved, it may be admitted. No objection, therefor, can be made merely on the ground that the other facts have not yet been evidenced. The possibility that the other facts may not be made good is a necessary risk to be taken; and in case of failure to make them good, the subsequent striking out of the evidence now offered is regarded as an adequate remedy..."

Thus, implicit in the Assistant U. S. Attorney's use of the words "dead man" was the understanding that proof of death of the man struck was immediately available and such would be forthcoming in due course of time. Within the context of our case, the dead body, about which we will discuss later, has to be properly "connected-up" by competent evidence with the person who was struck by our appellant less this tactical approach will operate prejudically to the one accused and cause a gross miscarriage of justice. Courts have been vigilant in protecting the accused from the harmful effects of such tactics. Where evidence has been improperly received and has not been "connected-up" it is erroneous to think that an instruction to disregard would be a sufficient corrective. The evidence may be so prejudicial that an instruction could not possible cure the harm. National Cash Register Co. v. Kay, Syl 3-5, Mo. App., 1938, 119 S.W. 2d 437.

As our subsequent analysis will show, the jury, in finding our appellant guilty of manslaughter, supplied evidence, in their own minds, that the Government had not offered. " Human nature

does not change merely because it is found in a jury box. The human mind is not a slate, from which can be wiped out, at the will and instruction of another, ideas and thoughts written thereon". People v. Deal, 357 Ill. 634, 643; 192, N.E. 649, 652 (1934).

POINT II

IN A SECOND DEGREE MURDER TRIAL THE GOVERNMENT MUST ALSO PROVE THE EXISTENCE OF A DEAD BODY AND IT MUST FURTHER IDENTIFY THIS BODY AS BEING THE SAME AS THAT OF THE PERSON CHARGED TO HAVE BEEN KILLED BEFORE PROOF OF THE CORPUS DELICTI IS COMPLETE

(With Respect To Point 2, Appellant Desires The Court To Read The Following Pages of The Reporter's Transcript: Tr. 29-38, inclusive.)

In this Second Degree Murder trial involving our appellant, it was necessary for the Government to prove the identity of the person charged to have been killed. The authorities refer to this identity of the slain person as the third element of the corpus delicti. 26 Am. Jur., Homicide, Sec. 6, Page 159. "The discovery and identification of a dead body or its remains as that of a person charged to have been slain establish the basis of the corpus delicti..." 78 Am. Dec., Page 257. Thus, we are faced with the question of whether the Government has proved the existence of the dead body and identified it as being the same body as that of the person charged to have been killed". Without this proof, there is no corpus delicti.

To establish the existence of a dead body, the Government called two witnesses: Dr. Linwood L. Rayford, Deputy Coroner for the District of Columbia and Arthur F. Digennaro, a Metropolitan Police Officer. Dr. Rayford testified to the performance of an autopsy on a "corpse" or "dead body" that was identified to him as "John Doe". Through a leading question put to Dr. Rayford as to whether he had learned the dead person's name to be James Wilson, Jr., Dr. Rayford answered in the affirmative. Contrastingly, Officer Digennaro, did not know and we can assume he never learned the name James Wilson, Jr., as having any association with this said dead body. According to Officer Digennaro he had discovered the dead body (though it was only unconscious at the time) on July 6, 1963 on the pavement of a sidewalk in the vicinity of Mount Vernon Place Northwest, in the District of Columbia. It is interesting to note here that the Deputy Coroner hypothesized on two probable contributing causes of the injuries from which death resulted: The striking over the head with a board (if same had been done to dead person) and a fall to the sidewalk pavement (if fall did happen to this dead person).

Thus the state of the evidence in its present form and structure leaves us with the remaining important question: Is the dead body that was discovered on July 6, 1963 in fact the same body as that of the person who was struck about the head by appellant on June 30, 1963?

To begin with, the Government's only witness to the striking never identified these bodies as one and same; neither did he give any testimony as to possible close resemblence or the like. To say the least, it was incumbent upon the Government to establish this identity if it in fact existed and the failure to do so is fatal. The corpus delicti has not been fully established.

By no means is this something without precedent where the prosecution has been called upon to identify the supposed victim of a murder. For this reason the prosecution has avilable to it many and various avenues open to establish the identity of a victim when it is the missing element. "In the case of homicide, any evidence is relevant to establish the identity of the victim. Generally, the same type of evidence which is admissible to establish the identity of the defendant is admissible to establish identity of the deceased... The opinions of witnesses and their impressions or beliefs are relevant to allow persons acquainted with the deceased to identify him by his pecularities, or by his clothing." Wharton's Criminal Evidence, Sec. 188, Page 377. See. also, 26 Am. Jur., Sec. 327, Homicide, Page 377-378 on methods of identifying the deceased.

Example cases are also helpful to us in determining how minimum standards of identity of the victim for whose death the accused is being tried can be established. In these cases it can be seen that direct evidence is used to prove this missing

identity and only where the body has been mangled and decomposed beyond normal recognition or unavailable because of a disappearance attributable to some act of the accused will circumstantial evidence be indulged in.

The only reason for this dependence upon the doctrine of circumstantial evidence to establish the crucial evidence is the fact that a combination of all the circumstances combine to lead logically to a conclusion as to the death and identity of a supposed victim. It should be noted here that our reliance on this doctrine is not and should not be suggestive of an abandonment of the legal probibition against allowing a jury to speculate as to the guilt or innocence of an accused. In other words, in a homicide case, as we have here, the first question is whether the facts justify a use of the circumstantial evidence doctrine to sustain a conviction.

Thus, where three weeks after the sudden and unexplained disappearance of a Negro boy seventeen years of age the headless body of a male Negro of about his size was found, which, on the trial of the one accused of the murder of the boy, was claimed to be his. The head was never found, but his clothes and the manner in which they were sewed and a particular sewing back of the shirt sleeves found on the headless body were proven by the mother of the boy to have been done by her and that the shirt was one he wore when last seen, and certain scars on the person alleged to have been killed; and a leather wrist band found on

the body was shown by the employer of the Negro boy who had disappeared to have been made from a piece of bridle rein belonging to this witness. It was held that this was sufficient proof that the person for whose murder the accused was on trial had been killed by the criminal act of another. Lancaster v. State, 91 Tenn. 267, 185 W. 777.

Again, upon the trial of one for the murder of a sixteen year-old girl, there was evidence that, a few hours before she was found, she was left in a farm house; that later in the day a body was found, after the distruction of the house by fire, under circumstances which might warrant the inference that at the expense of much exertion, a considerable quantity of cardwood had been carried into the cellar, and the body placed upon it after life was extinct; and the supplemental circumstance that a robbery had occurred in the house; and by way of identification, it was proven that the bones which remained consisting of the head, spinal column, and the pelvic bones were of such size as to be consistent with the description of this sixteen year-old girl; and a witness who knew her intimately testified to similarity on appearance with teeth with those of the girl, which were discribed as peculiar. All these facts were evidence of the existence of a dead body of its identity with that of the girl alleged to have been killed, who was alive a few hours before; and were held to contitute facts and circumstances from which jury might well have drawn inferences of sudden and unusual death,

with other facts and circumstances warranting an inference against suicide or accident. Paulson v. State, 118 Wis. 89, 94 N. W. 771

See also Perovich v. United States, 205 U.S. 86, 27 S. Ct. 45, 51 L. ed. 722, where the identification of a partly burned body as that of the victim was considered as not being perfect but circumstantially identified by a combination of facts, to wit: (1) remains of burned body found where victim was in fact living by himself; (2) similar property that victim was known to have, had been found in possession of accused; (3) statements by accused showing intent to rob and commit arson; (4) presence of accused at place of residence of victim; (5) fact that victim was not seen any more. The Court called each fact a link in the chain which make up a whole that victim who lived in this house was burned by accused. These facts related to each other, the most important being that victim lived there and was not seen anymore. No such circumstance was introduced in our case to link the body discovered on July 6, 1963 with that of the person struck on June 30, 1963. The fact of identity to make out the corpus delicti must be shown by cogent and competent evidence. Only the Government knew whether the witness Taylor could establish this identity. Indeed, the Government should have properly advised the Court as to whether the dead body found on July 6, 1963 could be so identified. The most natural inference is that it could not be identified and that the body discovered on July 6, 1963 was not the same as that of the person struck by

the appellant on June 30, 1963.

Except for the fact that the Government capitalized on an early advantage in the trial by obtaining a stipulation to the effect that "the deceased person hit over the head that night was named James Wilson, Jr., " there would be no need to discuss the cumulative effect of the evidence adduced in the Government's case-in-chief. How wise or unwise the entering into the stipulation may have been is not a matter of inquiry for this Court. However, the case law in this area is quite legion to the effect that under no circumstances may the "guilt " of an accused be stipulated to where this accused has pleaded "not guilty" to the indictment. The reason being that such a stipulation would be inconsistent with the accused's right to have a jury determine his guilt or innocence. See Leon C. Rucker v. United States, 108 U. S. App. D. C. 75, 280 F.2d 623; Julian v. United States, 236 F.2d 155.

More than the legal handicap involved in preventing the accused's counsel from agreeing to facts which would be tantamount to pleading guilty, there is another facet of this case before the Court, that is, the said stipulation had no foundation in factual circumstances out of which it could have arisen or have been predicated upon. It would be a gross miscarriage of justice to ascribe the full legal import no doubt intended by the Government in extracting this stipulation and

couching it in language suggestive of death of the person struck over the head by appellant.

Admittedly, in some areas of the law there is authority to the effect that identical names gives rise to an inference of identity of persons. This inference is considered slight when the name is common and there are a number of or many persons having the same name. Wharton's Criminal Evidence, (12th Ed. 1955) Sec. 100, P. 203. The matter is also covered in 9 Wigmore on Evidence, (1940 3rd Ed.), Sec. 2529, P. 453, et seg.

It is interesting to note that in the entire discussion appearing in Wigmore, supra, and the extensive coverage of cases only one case is cited and referred to where death was the issue and whether it could be determined by identity of names. This reference appears at page 458: "Kentucky: 1805, Nicholas V. Landale, Litl. Sed. C. 21 (to show identity of S.N., a plaintiff, said to be dead, the fact of death of one S.N. who had sailed from Baltimore and died in Madagascar, was held insufficient)". We can conclude that another mode identity is needed when death of a particular person is in issue. Nevertheless, the important thing is that: "The person killed or assaulted must be proven to be the person named in the indictment... The modern rule is that it is a question of identity..." 40 C.J.S., Homicide, Sec. 179, PP. 1078-1079. At page 1079, C.J.S., supra, the following appears in note 13:

> 'Identitate personae and not identitate nominis, is and should always have been the true and only issue!...

By no means has the Government shown that the name James Wilson, Jr., attaches to both bodies in the sense that they have been heard to call themselves James Wilson, Jr., or others who knew them have referred to them as James Wilson, Jr. In 5 Wigmore On Evidence (1940 3rd Ed), Sec. 1625a, page 508 an appropriate discourse appears on the meaning of a name:

> "By name is meant the words by which (a) either a man designates himself in social relations, or (b) by which other persons designate him" "Name is not an inherent trait of the person, it is a word used by himself or by others to individualize him to and identity him to and from others. Hence, when seeking to single him out from all other persons, i.e. (b) above."
>
> "Now this usage of others is merely one form of what is generally called or, in other words, common reputation as to the term to which he responds in his relations within this community."

Significantly, then, Deputy Coroner Rayford's testimony exposed the fatal witness of the Government's case. When asked whether the discovered dead body was identified to him as James Wilson, Jr., the Deputy Coroner said no to this question. Though the Deputy Coroner admitted having learned that there was a possible association of the name James Wilson, Jr., with the dead body, his answer to the first question reflected what he considered to have been more important to him, that is, nobody had identified this corpse at the morgue as being the body of a person known as "so and so"(in this case James Wilson, Jr.)

in his relation with this community. Thus, there was no identification to the official whose very duty it was to determine same as well as the cause of death.

POINT III

WHERE THE CORPUS DELICTI HAS NOT BEEN ESTABLISHED IN A SECOND DEGREE MURDER TRIAL THE TRIAL COURT HAD NO DISCRETION EXCEPT TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

(With Respect to Point 3, appellant Desires The Court To Read The Following Pages Of The Reporter's Transcript: (Same as Points 1 and 2) Tr. 2, Tr. 9-13 inclusive; Tr. 29-38, inclusive. Original Record: Indictment.)

Where the corpus delicti in, this Second Degree Murder trial, has not been established to a moral certainty, the jury should not be allowed to speculate as to the guilt or innocence of the appellant. It is doubtless true that no universal and invariable rule can be laid down in regard to the proof of corpus delicti. " Each case depends on its own peculiar circumstances. The body of the crime may be proven by the best evidence which is capable of being adduced, if it is sufficient for the purpose; but such an amount of accompanying or relative facts, whether direct or circumstantial must be produced as establishes the fact beyond a moral certaintl and to the exclusion of every other hypothesis." State v. Williams, 46 Or. 287, 297, 80 Pac. 655,660. The Government, in its case-in-chief failed to prove, either by direct evidence or for that matter circumstantial evidence, that the body found was the body of the person for whose murder the appellant had been indicated and tried.

Where the Government produced different witnesses who had seen the physical images of the one or the other of the two bodies sought to be identified as the same, a description or comparison of these images as they appeared to these witnesses would be the only relevant and competent manner by which identity of these said bodies could be established under the circumstances, even if these bodies bore the same name and they were in fact different imagewise to these witnesses, such as different in color, size, age, etc., proof of identity of persons would be lacking. Since the Government has the burden or proving identity of the victim, hearsay evidence about the possible sameness of names associated with the two bodies did not relieve the Government of its responsibility, of having its witness, Benjamin Taylor, who viewed appellant's striking of a man on June 30, 1963, describe and compare the image of the man he saw struck with that of man found dead on July 6, 1963. The same can be said of Deputy Coroner Rayford and Officer Diggennario, who viewed the body of the man discovered dead on July 6, 1963. Lack of testimony in this regard leaves the hypothesis of nonidentity just as logical as that of identity, a speculative conclusion nor permissible in law because of the duty of the Government to prove its case beyond a reasonable doubt.

Thus, at the close of the Government's case, the trial court should have granted appellant's motion for judgment of acquittal

appropriately made at that time. See Cephus v. United States, U.S. App. D.C. 1324 F2d 893 (1963). The doctrine and standards postulated in Curley v. United, 81 U.S. App. D.C. 389, 160 F. 2d 229, Cert. denied, 331, U.S. 837 rehearing denied, 331 U.S. 869, 870 (1947) most assuredly apply here.

This Court said:

> "This true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is not evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know no way to avoid that difficulty."

The Curley case clearly stands for the proposition that "unless there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence or if upon the whole of the evidence, a reasonable mind, is in balance as between guilt and innocence, a verdict of guilt cannot be sustained.

In addition to this fatal weakness in the identification of the discovered dead body whose death was the subject of our

inquiry, another inconclusive feature appears in the evidence, that is, cause of death. As indicated previously, the Deputy Coroner hypothesized on two causesof the injury from which death resulted, to wit: A blow on the head of a fall to the sidewalk pavement. However, according to the case of Altmayer v. Travelers Protective Assoc. (1941, CA 7 Wis.) 119 F 2d 1005, 1007-8, a third cause is as probable as the other two. The Court said:

> "The medical testimony at the trial was conflicting, some of the doctors holding that in a very large percentage of cases sub-dural hemorrhages are the result of trauma; the medical learning upon the subject is, likewise, at variance, many support the view that trauma is usually the contributing factor in such hemmorrhages; others believe that such hemmorrhages may be the result of either a traumatic condition of the patient and still others holding that trauma has nothing to do with it."

Here, the Court further precluded an inference that plaintiff had fallen down on hard surface without direct evidence of same from a witness who was present an inception of plaintiff's manifestations of symptoms of a condition indicative of the hemmorrhage causing plaintiff's death. This Court is certainly at liberty to require direct evidence that the discovered body is the one that was struck by appellant on the night of June 30, 1963. The following admonition appearing in 78 Am. Dec. 254 is quite appropriate:

> "But circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash conclusions."

A summary of all the Governments evidence in connection with this case against appellant fails to establish the most essential element of a homicide case, to wit: identity of the dead body for whose death the appellant was indicted and tried.

CONCLUSION

In conclusion this Court, in view of the foregoing, should reverse the judgment below and cause a judgment to be entered therein for appellant.

JOHN McDANIEL
Attorney for Appellant
2000 Ninth Street, N. W.
Washington, D. C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18424

LEROY J. ELLIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

JOSEPH A. LOWTHER,
Assistant United States Attorney.

NATHAN LEWIN,
Attorney,
Department of Justice.

QUESTIONS PRESENTED

1. Did the appellant stipulate in the District Court that the deceased was the same person whom he struck on the head several days before his death?

2. May the appellant assert for the first time in this Court an alleged gap in the evidence which was never brought to the attention of the trial court and which appellant did not contest during the trial?

3. Was the evidence that appellant's blow was the proximate cause of decedent's death sufficient to justify submission of the case to the jury?

723-034—64

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TABLE OF CASES

*Cases or authorities chiefly relied upon are marked by asterisks.

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APPEAL FROM THE UNITED STATES DISRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a one-count indictment filed on August 12, 1963, with having murdered James Wilson, Jr., on or about June 30, 1963, by "striking him with a piece of wood, causing injuries from which the said James Wilson, Jr., did die on or about July 6, 1963." The indictment alleged murder in the second degree, in violation of 22 D.C. Code § 2403. Appellant was tried by a jury before Judge Richmond B. Keech on October 28 and 29, 1963. The jury found him guilty of the lesser included offense of manslaughter. On January 21, 1964, appellant was sentenced to imprisonment for two to six years.

Evidence for the Government

At the outset of the trial, after opening statement, counsel for the Government stated the following in open court:

> It is stipulated by and between counsel for the Defendant Ellis and counsel for the Government, with

> leave of the court, that the deceased person that was hit in the head that night was a man named James Wilson, Jr., [Supplementary Transcript, p. 2]

This statement was agreed to by appellant's counsel, and the jury was instructed that it constituted evidence "just the same as though it had been testified to." (*Ibid.*)

The Government's first witness, Benjamin F. Taylor, testified that on the evening of June 30, 1963, he observed one Robert McFarland, whom he knew personally, engaged in a fight near a tavern at 436 L Street NW. (Tr. 4). He saw two or three persons—one of whom he "learned later was Wilson"—slashing at McFarland with knives, and these attackers ran from the scene when appellant and another person joined the altercation (Tr. 4–6). Taylor then assisted McFarland, who had been hurt, into his car and began to drive him to the hospital (Tr. 6–7). When his automobile reached the corner of Fifth and K Streets, Taylor saw appellant chasing Wilson down Fifth and in a diagonal direction across K Street (Tr. 7–8). He testified that appellant caught Wilson in front of a building on the south side of K Street and hit Wilson on the back of the head with a wooden board (Tr. 8–10). Wilson fell face down inside the gate of the building (Tr. 12). Appellant threw away the board and returned across K Street (Tr. 12).

On cross-examination Taylor said that he did not know Wilson and had not seen him in the vicinity prior to that evening (Tr. 14). He also testified that he had seen the chase and appellant's assault on Wilson because the light had turned red on the corner of Fifth and K Streets as he was approaching the intersection (Tr. 21–24).

Dr. Linwood L. Rayford, Jr., Deputy Coroner for the District of Columbia, testified that on July 7, 1963, he performed an autopsy on the remains of James Wilson and that he determined the cause of death to be an "epidural," which he defined as "a collection of blood above the thickest covering of the brain," and a "subdural," which is "a collection below this thick covering and between the brain and this thick covering" (Tr. 29–30). In addition to this hemorrhage, the doctor found a fracture of the skull (Tr. 31). In answer to a hypo-

thetical question, Dr. Rayford testified that a blow with a wooden board of the sort testified to by Taylor inflicted on June 30, 1963, could "very definitely" have been a contributing cause of Wilson's subsequent death a few days later (Tr. 30). On cross-examination, Dr. Rayford agreed that some other kind of force could have produced the same result, and that death could have been caused by Wilson's falling on a concrete pavement (Tr. 32–A). He said, however:

> I would say that the question as posed by [government counsel] was the most probable, was the most probable cause. [Tr. 32.]

Dr. Rayford also testified that Wilson was under the influence of alcohol at the time of his death (Tr. 33–34).[1]

The Government's concluding witness was the officer of the Metropolitan Police Department who had found Wilson unconscious in the vicinity of Mount Vernon Place on July 6, 1963. He testified that Wilson had been taken to D.C. General Hospital, and that he died at approximately 10:00 or 10:30 p.m. (Tr. 35–37).

Evidence for the defendant

Robert McFarland testified that three unknown men attacked him with knives on June 30 near the tavern on L Street, and that appellant came to his assistance (Tr. 41–42). He said he did not know anyone named James Wilson (Tr. 40), and that he had not known the appellant before that evening (Tr. 40, 50). McFarland testified on cross-examination that he had seen two or more people chasing the deceased, that the "big man" had a stick in his hands (Tr. 52–53),[2] and that he held the stick in the air (Tr. 56).

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[1] At a later point during the trial, Dr. Rayford was recalled to testify regarding the reason why the deceased's "Identification Form" listed his death as "accidental." His testimony disclosed that it had not been known at the time that the decedent had been hit on the head with a wooden board several days before he was found unconscious (Tr. 82–91). At that time the doctor answered affirmatively to the hypothetical question whether the blow could "to a medical probability, have been the proximate cause of [Wilson's] death" (Tr. 92).

[2] Appellant testified that he was six feet, four inches tall (Tr. 118).

Demos Summers testified that he had been on the street with appellant and one Jamison when McFarland was attacked (Tr. 63–64). When they came to McFarland's rescue, the attackers ran from the scene and appellant chased after them with a stick in his hand and was accompanied by Jamison (Tr. 65–65). Summers testified that when appellant returned he had said that "he hit one of the guys * * *" (Tr. 66, 97). On cross-examination Summers testified that the decedent had been running considerably ahead of appellant down L Street (Tr. 73–75) and that appellant turned the corner at Fifth Street in pursuit of the decedent with the stick in his hand (Tr. 76). He also stated that after learning that Wilson had died, appellant asked him whether he could be charged with murder and, on receiving an affirmative answer, appellant said "he had better get out of town" (Tr. 98–99). On redirect examination, Summers said he did not know Wilson and had been unable to identify him from a photograph as having been one of the men murdered in the altercation (Tr. 104).

Appellant testified that he was playing football in the street on the evening of June 30 when he saw "the deceased, James Wilson" attack McFarland and cut him with a knife (Tr. 107). When Wilson began throwing bricks at him, appellant, together with others, chased after Wilson (Tr. 108–109). Appellant said he picked up a board, which he threw at Wilson as Wilson reached the gate of a house on K Street. At the same time, appellant testified, someone hit Wilson with a brick, and he fell down. "He came back up and he hit his forehead on the ground" (Tr. 109). Appellant testified that he saw Wilson in the company of a man called Cooper on the following day—a Monday—and again on Tuesday, Wednesday, and Thursday (Tr. 110–111). On the following Sunday he was informed that Wilson had died and that the police were looking for him (Tr. 111). Appellant then left for his mother's home in Trenton, New Jersey, where he surrendered himself on Tuesday, July 9 (Tr. 113).

On cross-examination appellant testified that he had picked the board up from the sidewalk (Tr. 122–124), and that he carried it while he was chasing after Wilson (Tr. 127). He said that as he crossed K Street he raised the stick in order to hit Wilson (Tr. 140), that he threw the board at Wilson, and

that it hit him in the back of the head at the same time as a stone hit him on the hip (Tr. 143). The decedent then fell to the ground (Tr. 142, 146).

The defense made motions for judgments of acquittal at the conclusion of the Government's case and after all the evidence was in (Supp. Tr. 2, 3). The grounds for these motions were stated as follows by defense counsel:

> If your Honor please, I would like to interpose a motion for judgment of acquittal on the ground that the government has not shown causation between the alleged occurrence on June 30, 1963, and the resulting death of July 6, 1963 and that the doctor said that a falling on the pavement could have caused his death and the intervening time between June 30 and the date of the death, July 6 * * *. [Supp. Tr. 2.]

In the course of the presentation of the defense, appellant's counsel also stated to the court:

> Your Honor, subject to my client's approval, I want my case to sink or swim on the question of the cause of death. [Tr. 93.]

All motions for judgments of acquittal on this ground were denied (Supp. Tr. 3).

STATUTES INVOLVED

Title 22, § 2403, District of Columbia Code, provides:

> Whoever with malice aforethought, except as provided in sections 22–2401, 22–2402, kills another, is guilty of murder in the second degree

Title 22, § 2405, District of Columbia Code, provides:

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

SUMMARY OF ARGUMENT

I

Appellant's principal contention on appeal is that the Government's case-in-chief failed to establish that the victim of

the assault on June 30 was the same James Wilson, Jr., who died on July 6. This is a claim that was not made at all in the District Court, and, indeed, statements made by appellant's counsel in the District Court indicate that he construed the oral stipulation—as did the Government—to mean that the same James Wilson, Jr., who was found unconscious on July 6 was the person by that name whom appellant struck on the head with a wooden board on June 30.

Consequently, appellant's contention in this regard is without merit for two separate reasons. *First*, if the oral stipulation is construed in light of the apparent understanding of it by all counsel and by the court during the trial, it amounted to an agreement that the man struck by appellant on June 30 was the same James Wilson, Jr., who died on July 6. *Second*, irrespective of the stipulations' construction, appellant's failure to advert during the trial to the gap in the evidence which is now being asserted—*i.e.*, whether the man who was struck on June 30 was the same man who died on July 6—bars its belated presentation at this juncture.

II

Appellant's subsidiary contention in this Court is the same as his sole defense at the trial. Appellant contends that the evidence failed to establish with sufficient certainty that the blow on the deceased's head struck on June 30 caused his death on July 6. The only medical testimony presented at the trial was that of the Deputy Coroner, and he testified that appellant's blow was the "most probable" cause of death. Hence there was sufficient evidence to sustain the jury's verdict.

ARGUMENT

I. Appellant cannot now contend that the evidence was insufficient to establish the identity of the victim

A. The stipulation, as understood by the parties, established identity

(Supp. Tr. 2; tr. 8–12; tr. 14) (Tr. 93).

At the very outset of the trial Government and defense counsel orally agreed "that the deceased person that was hit in the head that night was a man named James Wilson, Jr."

(Supp. Tr. 2). Appellant now would read that stipulation, to which his attorney consented in his presence, as if the word "deceased" were omitted from it. In effect, appellant contends that this stipulation only established the name of the victim of the blow, and that it was not intended to concede that the same man who was hit by appellant was the man who died several days thereafter. This construction is inconsistent with the words of the stipulation and with the parties' understanding of it as manifested throughout the trial.

1. The stipulation spoke of "the deceased person"—*i.e.*, the victim of the homicide charged in the indictment—as one "that was hit in the head that night," and identified his name as James Wilson, Jr. (Supp. Tr. 2). Implicit in this statement is the premise that "the deceased person" and the "person that was hit in the head that night" are one and the same. If, as appellant contends, it was the sole purpose of the stipulation to identify by name the man who was struck, the word "deceased" would be totally extraneous.

2. Moreover, the conduct of defense counsel during the trial indicated that he placed this same construction on the stipulation. He did not object when Government counsel, in directing questions to his first witness, spoke of the man who was involved in the altercation on June 30 as "the dead man" (Tr. 8, 9, 10, 11, 12), nor when the witness spoke of the victim of the blow as "the deceased fellow" (Tr. 12). Indeed, defense counsel himself responded affirmatively to the witness' inquiry on cross-examination regarding Wilson:

> Q. [By Mr. McDaniel]. Now, do you know Mr. Wilson personally? I mean, are you acquainted with him?
>
> A. The dead man?
>
> Q. Yes. [Tr. 14.]

Another question put by appellant's counsel almost immediately thereafter was: "Had you seen the deceased, Mr. Wilson, around that area where you live? (Tr. 14).

Under these circumstances, it is obvious that appellant's counsel assumed during the trial that it had been stipulated that the deceased man and the victim of appellant's blow on

June 30 were the same person. It is hardly open to appellant now to import an ambiguity into a stipulation which was clearly understood by the parties when made.

Stipulations of fact in criminal cases are, of course, fully binding on the parties just as they are in civil actions. *H. Hackfeld & Co.* v. *United States*, 197 U.S. 442, 446–447 (1905); *Palmquist* v. *United States*, 283 F. 2d 758 (5th Cir. 1960); *United States* v. *Rodriquez*, 241 F. 2d 463 (7th Cir. 1957); *United States* v. *Monroe*, 164 F. 2d 471, 476 (2d Cir. 1947), *cert. denied*, 333 U.S. 828 (1948). And this is not a case, as was *Lubin* v. *United States*, 313 F. 2d 419, 421–422 (9th Cir. 1963), in which the stipulation is so unclear that the defendant could have been laboring throughout the trial under some misapprehension as to its meaning.

The present case is, in this respect, similar to *United States* v. *Hefler*, 159 F. 2d 831 (2d Cir.), *cert. denied*, 331 U.S. 811 (1947), in which the appellant first claimed, after trial, that a stipulation that certain goods had been stolen while in interstate commerce was insufficient "to prove that the theft was from a truck or any of the other places specified in the statute." 159 F. 2d at 833. The Second Circuit termed this and another similar argument "extraordinary contentions to present for the first time on appeal. Each is plainly an afterthought, never suggested at the trial; neither has the slightest merit." *Ibid.* It concluded from statements made by counsel during the trial and from the body of the stipulation that it encompassed the allegedly absent element of the offense.

B. The asserted insufficiency of evidence cannot first be raised in this Court

In addition to the meaning cast upon the stipulation by counsel's silence regarding this matter, the failure to advert during trial to the alleged gap in the proof bars appellant from first raising the point at this stage. It is apparent from the short statement made at the conclusion of the Government's case by appellant's counsel in support of his motion for judgment of acquittal (p. 5, *supra*) that he was not relying at all on the Government's alleged failure to establish the identity of appellant's victim on June 30. The sole ground for the motion was the asserted failure to prove "causation" between

the blow and the subsequent death, with no attempt having been made during cross-examination to contest the assumption made by counsel and witnesses alike that the recipient of the blow was the man who died on July 6. This emerges even more clearly from the statement subsequently made by appellant's counsel (p. 5, *supra*; Tr. 93) that the case would "sink or swim on the question of the cause of death."

In short, appellant is asserting in this Court a gap in the Government's proof on an element of the offense which he appeared to accept without contest in the District Court. Had the issue of identity not been put to rest by the stipulation during the trial, the Government could have introduced testimony describing the victim of appellant's attack on June 30 or otherwise establishing that the man who died on July 6 was the same man who was struck on the head on June 30. Appellant's apparent readiness to concede this point rendered such proof unnecessary. Hence, the same may be said of this contention as was said of an identical claim in *Russell* v. *United States*, 119 F. 2d 686, 688 (8th Cir. 1941): "The present position of appellant is either the result of an afterthought following the trial or the result of a trap carefully concealed until completion of the trial. With the record in this situation, appellant cannot be heard here on this contention." See also *United States* v. *Schnoll*, 142 F. 2d 704 (7th Cir. 1944); *United States* v. *Hefler*, 159 F. 2d 831 (2d Cir.), *cert. denied*, 331 U.S. 811 (1947).

II. There was sufficient evidence for the jury to conclude that the blow was the proximate cause of death

(Tr. 92; tr. 32–A.)

The Deputy Coroner was the only medical expert to testify, and he stated his opinion that "the most probable cause" of Wilson's death was the blow on the head he had received several days before his death (Tr. 32). On being recalled for another purpose, the Deputy Coroner again answered affirmatively to the hypothetical question whether the blow on the head was "to a medical probability * * * the proximate cause of [Wilson's] death" (Tr. 92). Appellant contends that the doctor's statement on cross-examination that falling on a con-

crete pavement could produce death with the same symptoms (Tr. 32–A) created sufficient doubt about the cause of death that a judgment of acquittal should have been entered. But the mere existence of a medical possibility that death was caused by other factors does not prevent submission of the case to the jury. See *Simms* v. *United States*, 101 U.S. App. D.C. 304, 248 F. 2d 626, cert. denied, 355 U.S. 875 (1957); *Smith* v. *United States*, 109 U.S. App. D.C. 28, 283 F. 2d 607 (1960); *Jackson* v. *United States*, No. 17,807 (decided December 12, 1963). The overwhelming weight of authority is that expert testimony of the sort presented here by the Government is more than adequate to sustain a finding that death was caused by appellant's act. See Annot., 135 A.L.R. 516–546, and authorities cited. The Deputy Coroner's testimony on cross-examination produced no more than the bare possibility that the symptoms might have occurred by a fall to the pavement—which might itself have been caused by appellant's assault on the decedent. Whether they had been so caused was a question properly submitted to the jury.[3]

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

NATHAN LEWIN,
Attorney,
Department of Justice.

APRIL 1964.

[3] Appellant contends that under *Cephus* v. *United States*,—U.S. App. D.C.—, 324 F. 2d 893 (1963), his right to a judgment of acquittal must be judged by the posture of the case at the conclusion of the Government's evidence-in-chief. For purposes of this case we assume, *arguendo*, that the proposition is correct, and submit that the evidence was then sufficient to sustain the District Court's denial of the motion. It should be noted, however, that *Cephus* was a multi-defendant case where a co-defendant's testimony filled gaps in the Government's case.

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